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IN THE

Supreme Court of the United States

LEILA JEANNE HILL, *et al.*,
Petitioners,

v.

STATE OF COLORADO, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF AMICI CURIAE OF NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE, NATIONAL ABORTION FEDERATION, NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF RESPONDENTS

(Additional *Amici* Listed On Inside Front Cover)

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COLORADO NARAL

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TABLE OF CONTENTS

INTEREST OF AMICI 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE COLORADO STATUTE IS A CONTENT AND VIEWPOINT NEUTRAL REGULATION OF FORCED PHYSICAL PROXIMITY 4

A. Because the Statute Regulates Only Forced Physical Proximity, It Does Not Prohibit Any Speech 5

B. The Statute Is Content-Neutral Because It Regulates Physical Proximity Irrespective of Content or Viewpoint 8

II. THE COLORADO STATUTE IS NECESSARY TO PROTECT THE SIGNIFICANT GOVERNMENTAL INTEREST IN SAFE ACCESS TO HEALTH CARE 13

A. Unwanted Invasions of Personal Space While Seeking Health Care Are Intimidating and Physically and Psychologically Dangerous 15

B. Zones of Separation Are an Essential Tool for Preserving Medical and Public Safety 19

III. THE COLORADO STATUTE IS NARROWLY TAILORED AND BURDENS NO MORE SPEECH THAN NECESSARY TO PROTECT THE GOVERNMENTAL 22

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Boos v. Barry, 485 U.S. 312 (1988) 19

Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978) 14

Cantwell v. Connecticut, 310 U.S. 296 (1940) 11

City of Fargo v. Brennan, 543 N.W.2d 240 (N.D. 1996) 7

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 8

Cohen v. California, 403 U.S. 15 (1971) 11

Edwards v. South Carolina, 372 U.S. 229 (1963) 11

Flamm v. Van Nierop, 291 N.Y.S.2d 189 (Sup. Ct. 1968) 7

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) 11

Frisby v. Schultz, 487 U.S. 474 (1988) 12

Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) 6

Grayned v. City of Rockford, 408 U.S. 104 (1972) 9, 13

International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) 9, 12

Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994) ..... *passim*

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 9

NLRB v. Baptist Hosp., Inc., 442 U.S. 773 (1979) 14

New York State NOW v. Terry, 886 F.2d 1339, 1343 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) 6

Operation Rescue v. Planned Parenthood, 1998 WESTLAW 352942 (Tex. July 3, 1999) 18

People of the State of New York et al. v. Operation Rescue National et al., CV. 99-209A (W.D.N.Y. 1999) .. 21

People v. Blackwood, 476 N.E.2d 742 (Ill. App. 1985) 7

People v. Calvert, 629 N.E.2d 1154 (Ill. App. 1994) 7

Petersen v. State, 930 P.2d 414 (Alaska Ct. App. 1996) ... 7

Pro-Choice Network of Western New York v. Project Rescue, 799 F. Supp. 1417 (W.D.N.Y. 1992) 18

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 3, 8

Rowan v. United States Post Office, 397 U.S. 728 (1970) 9, 12

Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997) ..... *passim*

Schneider v. State, 308 U.S. 147 (1939) 12

United States v. Scott, 187 F.3d 282 (2d Cir. 1999) 23

United States v. Scott, 958 F. Supp. 761 (D. Conn. 1997) 16, 18, 22

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 3, 8, 22

Welsh v. Johnson, 508 N.W.2d 212 (Minn. 1993) 7

Statutes and Rules

18 U.S.C. § 248 (1994) 19

Colorado Revised Statutes Section 18-9-122(3) (1999) ..... *passim*

Supreme Court Rule 37.3 1

Supreme Court Rule 37.6 1

Other Authority

Nancy E. Adler, et al., *Psychological Factors in Abortion*, AM. PSYCHOLOGIST 1194 (Oct. 1992) 17

Irwin Altman, THE ENVIRONMENT AND SOCIAL BEHAVIOR: PRIVACY, PERSONAL SPACE, TERRITORY, CROWDING 93 (1975) 15

Catherine Cozzarelli & Brenda Major, *The Effects of Anti-Abortion Demonstrators and Pro-Choice Escorts on Women's Psychological Responses to Abortion*, 13 J. SOC. & CLINICAL PSYCHOL. 404 (1994) 17

Edward T. Hall, *The Effects of Personal Space and Territory on Human Communication*, in NONVERBAL COMMUNICATION IN HUMAN INTERACTION 114-31 (Mark L. Knapp ed., 1978) 15

S. Henshaw, et al., *Alan Guttmacher Institute Working Paper on Abortion Access* (1999) 20

LaFrance et al., *Sex Differences in Reaction to Spatial Invasion*, 102 SOCIAL PSYCHOLOGY 59 (1977) 16

Bernard S. Linn, M.D. et al., *Effects of Psychophysical Stress on Surgical Outcome*, 50 PSYCHOMATIC MEDICINE 230 (1988) 16

Anne Mayande et al., *Anxiety and Endocrine Responses to Surgery*, 54 PSYCHOMATIC MEDICINE 275 (1992) 16

Fritz-Ulrich Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 INT'L J. ORAL MAXILLOFACIAL SURGERY 688 (1987) 16

National Abortion Federation, *Incidents of Violence and Disruption Against Abortion Providers* (last modified Nov. 1999) <http://www.prochoice. org/ violence/ 99vd.htm> 20, 24

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INTEREST OF AMICI[1]

Amici are organizations dedicated to ensuring safe access to reproductive health care, many of whom have appeared before this Court in previous cases in which access to reproductive health care was threatened. *Amici* seek to advance their common mission through various means, including public education, representation of providers and patients in litigation, and advocacy. Some *amici* are organizations whose members are providers of reproductive health care; others are advocates and interested citizens. All *amici* are committed to ensuring that patients are not subjected to unwelcome, intimidating advances while seeking access to health care and, thus, support the position of Respondents in this case. The individual interests of *amici* are set forth in Appendix A to this brief.

STATEMENT OF THE CASE

Amici adopt the statement of the case in Respondents' Brief.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Supreme Court Rule 37.3. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Colorado Revised Statute § 18-9-122(3) is critical to the ability of individuals in Colorado to access health care safely. By merely regulating the physical proximity separating demonstrators from their targets, without in any way restricting the content of demonstrators' messages, the statute ensures the safe provision of health care. Mindful of the special circumstances affecting persons seeking access to health care, this Court has endorsed the view that the government can regulate abusive conduct targeted at entering health care facilities. *See Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). The Colorado statute reinforces that notion by providing a critical zone of separation between demonstrators and health care providers and patients. By proscribing unwanted physically close encounters between demonstrators and their targets, the statute minimizes the potential adverse health effects caused by aggressive "in-your-face" confrontations in order to ensure safe access by all to needed health care.

The Colorado statute is a content neutral regulation that does not curtail speech. It simply regulates the distance between the demonstrator and his or her target, regardless of the content of his or her message. Demonstrators' First Amendment right to engage in numerous forms of communication such as leafleting, picketing, yelling, or singing within 100 feet of health care facilities is not restricted at all. Rather, demonstrators merely are prohibited from forcing unwanted close physical proximity within a distance of eight feet of a person entering a health care

facility. Such a restriction is clearly content neutral – it does not impinge on what a demonstrator can communicate; it controls only the demonstrator's proximity to his or her target. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992).

The statute's regulation of the physical distance between demonstrators and persons entering health care facilities is necessary to protect the government's unassailable interest in protecting individuals' right of access to health care. Because of the incompatibility of noisy, disruptive, threatening activity with the provision of health care services, this Court has long recognized the need to regulate certain types of protest activities around hospitals and other health care facilities. *See, Madsen*, 512 U.S. at 769-71. This is particularly true due to the intolerable health risks caused by the stress of unwanted face-to-face confrontations between demonstrators and individuals seeking access to health care. The Colorado statute, therefore, is an appropriate way for the state to ensure that individuals in Colorado have unimpeded access to health care.

Finally, although the appropriate standard for reviewing the Colorado statute is the time, place and manner test used by the Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the statute also is constitutional under the more stringent standard applied to injunctions: it is no more burdensome than necessary to protect the significant government interest in safe access to health care. *Madsen*, 512 U.S. at 765. Because the statute regulates only unwanted physical proximity, and does not curtail speech, it is narrowly tailored to meet the legislature's important

objective of protecting persons entering health care from aggressive, threatening invasions of their personal space caused by unwelcome, overly close physical encounters with demonstrators.

ARGUMENT

I. THE COLORADO STATUTE IS A CONTENT AND VIEWPOINT NEUTRAL REGULATION OF FORCED PHYSICAL PROXIMITY

On two recent occasions, this Court has found that government appropriately may regulate abusive "in-your-face" actions by protestors targeted at people seeking access to health care facilities who may be medically vulnerable. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). The present case reiterates this principle so essential to the safe provision of health care. The method chosen by the State of Colorado to control the harms of coerced face-to-face confrontations with health care providers and patients is far less restrictive of demonstrators' rights than the demonstration-free "buffer zones" upheld in *Schenck* and *Madsen*. Colorado Revised Statutes § 18-9-122(3) (1999) regulates only the action of forced physical proximity of less than eight feet on an unwilling person specifically targeted by a demonstrator. It does not restrict or limit any speech; it simply prescribes the amount of space a demonstrator must maintain between himself and him mark when the person preyed upon does not wish to permit a closer physical encounter.

A. Because the Statute Regulates Only Forced Physical Proximity, It Does Not Prohibit Any Speech

Petitioners and their *amici* repeatedly mischaracterize the Colorado statute. They proclaim it to be a total ban on speech on the public sidewalk (Petitioners' Brief at 14); to operate so as to completely silence protestors (Petitioners' Brief at 25, 49); and to effectively ban all leafletting (Brief of American Federation of Labor and Congress of Industrial Organizations at 7). These characterizations completely distort the wording and effect of § 18-9-122(3). Within a geographic buffer zone of 100 feet from entrances to health care facilities, the statute permits any and all speech by demonstrators on any imaginable topic and from any conceivable point of view: picketing, chanting, praying, singing, yelling, using bullhorns. Leafletting also is fully preserved; stationary pamphleteers can stand anywhere on the sidewalk adjacent to a health care facility, or right alongside the facility's entrance within inches of everyone using that entrance, offering literature to anyone who wants it. The only thing that is proscribed within a 100-foot zone is "knowingly approaching" a specifically targeted person more closely than eight feet when such physically close presence is objectionable to the target. While standing eight feet away, the demonstrator still can say anything or display any sign or leaflet to that person. Demonstrators even can scream at that person, or continue to insist that the targeted person allow a closer approach or take a leaflet or look at a sign. The demonstrator does not have to cease and desist from saying a word, or from doing anything except knowingly approaching

someone at a distance of less than eight feet when the target objects to such proximity. *Cf. Schenck*, 519 U.S. at 384-85 (rejecting First Amendment challenge to injunctive provision that required demonstrators to cease and desist from all communication with an unwilling target and back away to a distance of fifteen feet). Under the Colorado statute, patients seeking access to health care are not shielded from any messages or any messengers; they are protected solely from demonstrators knowingly approaching them at a distance of less than eight feet.

Colorado's speech-permissive regulation of the space between demonstrator and target does not curtail any First Amendment right. No court has ever acknowledged a First Amendment right to force close physical proximity on individuals entering or leaving health care facilities. On the contrary, numerous courts have held that the conduct regulated by the Colorado statute – approaching physically close to someone who does not want such a confined encounter – is independently proscribable as harassment and invasion of another's personal space, disorderly conduct, or stalking.[2] *See, e.g., New York State NOW v. Terry*, 886 F.2d 1339, 1343 (2d Cir. 1989) (no First Amendment right to demonstrate in close proximity to particular people; doing so is tortious harassment and invasion of personal space), *cert. denied*, 495 U.S. 947 (1990); *Galella v. Onassis*, 487 F.2d

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[2]This is not to say that harassment and stalking laws are adequate substitutes for zone of separation statutes. As is demonstrated by the state law harassment and stalking cases cited in the text, *infra*, unlike clinic access offenses, harassment and stalking typically require repeated contacts over time, often in the context of an historically acrimonious personal relationship.

986 (2d Cir. 1973) (shadowing, coming too close to, and photographing Jackie Onassis and her children without their consent, even for newsgathering purposes, constitutes tortious harassment and is unprotected by First Amendment); *Petersen v. State*, 930 P.2d 414 (Alaska Ct. App. 1996) (repeatedly closely approaching targeted person against that person's wishes can constitute stalking, and is not constitutionally protected); *City of Fargo v. Brennan*, 543 N.W.2d 240 (N.D. 1996) (protestor prosecuted for disorderly conduct for invading personal space and waving arms close to unwilling targeted victim; court holds that this is physically intimidating, threatening conduct not protected by First Amendment); *People v. Blackwood*, 476 N.E.2d 742 (Ill. App. 1985) (man subject to prosecution for coming physically close to ex-wife and screaming at her; court finds this conduct "not subject to constitutional protection under any circumstances"); *People v. Calvert*, 629 N.E.2d 1154 (Ill. App. 1994) (criminal harassment and assault charges for coming physically close to individual who did not want the contact, and screaming and gesticulating in her face); *Welsh v. Johnson*, 508 N.W.2d 212 (Minn. 1993) (protestor may be prosecuted under harassment statute for invading clinic employee's personal space); *Flamm v. Van Nierop*, 291 N.Y.S.2d 189 (Sup. Ct. 1968) (conduct of walking or driving physically close to plaintiff constitutes torts of assault and intentional infliction of emotional distress).

In sum, the Colorado statute regulates only the conduct of knowingly approaching physically closer than eight feet to someone who does not welcome such a physically invasive manner of message delivery. This speech- permissive "don't get too close" statute is a

reasonable content-neutral time, place, and manner regulation. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

B. The Statute Is Content-Neutral Because It Regulates Physical Proximity Irrespective of Content or Viewpoint

The first criterion for whether a statute that affects expressive activity may be upheld as a reasonable time, place, and manner regulation is the requirement that it be content-neutral, or justified without reference to the content of the regulated expressive activity. *Ward*, 491 U.S. at 791; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).[3] Petitioners mistakenly argue that the Colorado statute is not content-neutral because it applies to the expressive activity of unwelcome close physical approaches only when done for the purposes of "oral protest, counseling, or education." (Petitioners' Brief at 31-32). Petitioners and their *amici* have confused the purpose or method employed by a speaker for communicating his or her message with the content or viewpoint of that message. This Court's content-neutrality analysis has been concerned *not* with how a speaker conveys a message, but with whether a statute or injunction singles out speech for regulation because of its content or viewpoint. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) (explaining Court's concern

[3]As will be discussed in section III, *infra*, even if the stricter test applied to injunctions in *Madsen* and *Schenck* governed here, the Colorado law would be constitutional.

with viewpoint discrimination). In innumerable past cases, this Court has upheld as content-neutral statutes and injunctions that apply to particular forms or methods of communication, so long as the statutes have not been targeted at particular messages or views on a topic. *See, e.g., Madsen*, 512 U.S. at 764 (restriction on "demonstrating" within certain distance of health care facility); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (ban on face-to-face solicitation in airports); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (ban on posting signs on public property); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (ban on disruptive "demonstrations" near schools); *Rowan v. United States Post Office*, 397 U.S. 728 (1970) (ban on unwelcome mailings). Petitioners' argument is notably similar to the argument rejected in *Madsen*, in which this Court held that an injunction's application only to the activity of "demonstrating" by the defendants did not render it unconstitutionally content-specific. *Madsen*, 512 U.S. at 762-63.

The Colorado statute is based on an extensive legislative record depicting demonstrators who frequently crowded, pushed, swarmed around, and came intimidatingly physically close to people seeking health care. Thus, its restriction on unwanted physical proximity is justified without reference to the content of the message of any demonstrator. The aim of the statute is to protect people seeking health care from physical intimidation and crowding so as to facilitate unfettered, safe access. (*See, e.g.*, JA at 59-60, 113-17). The statute does not insulate anyone in the vicinity of a health care facility from any message or

viewpoint. From the modest distance of eight feet, or even closer if remaining stationary, demonstrators may direct any message they wish to anyone. Any protestor is free, from the readily visible and audible distance of eight feet, to preach about the importance of birth control or against its evils; to exhort for or against euthanasia or animal research; to praise or condemn the labor policies of the health care facility; to embrace or castigate HMOs; to read from the Bible or the Koran or from anti-religious tracts.

Petitioners also argue that Colorado statute § 18-9-122(3) is content-specific because demonstrators' ability to get physically very near to someone hinges on that person's consent to the physical closeness. (Petitioners' Brief at 31-33). This argument is virtually identical to the argument rejected in *Schenck*, 519 U.S. at 384-85. In *Schenck* the petitioners unsuccessfully asserted that the "cease and desist and back away" provision upheld by this Court was content-specific because it applied only when someone disagreed with the message of so-called sidewalk counselors. *Id.* This Court specifically rejected that argument, noting that the cease and desist provision affected only physical proximity between demonstrator and unwilling target, not the demonstrator's ability to convey a message. *Id.* at 385. "These counselors remain free to espouse their message outside the 15-foot buffer zone." *Id.*

That observation, made by this Court in *Schenck*, applies with even greater force here. Under the Colorado statute, all that the target can refuse is an unwanted physical approach closer than eight feet. Targeted individuals cannot silence any message being directed to them or to anyone else. From eight feet away – which is a normal conversational

distance, especially for encounters between strangers in public (*see* Section II.B, *infra)* – protestors and their messages will be fully and easily audible and visible. No speech is silenced; all viewpoints still can be conveyed from a normal conversational distance.

For these reasons, Petitioners' attempt to analogize the Colorado statute to a "heckler's license or veto" is unavailing. (Petitioners' Brief at 23). The heckler's or listener's veto principle applies when speech is completely and prematurely cut off, or the speaker is prevented entirely from conveying her ideas. *See Edwards v. South Carolina*, 372 U.S. 229, 237-38 (1963) (peaceful speakers may not be arrested for breach of peace because their speech may stir people to anger, invite public dispute, or bring about unrest); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (licensing scheme may not allow regulator to preclude speech entirely by denying a license application because of anticipated reaction by listeners). A listener's opposition ordinarily may not be the reason for restricting a speaker's ability to reach other willing listeners. *See, e.g., Cohen v. California*, 403 U.S. 15, 23 (1971) (overturning breach of peace conviction despite the assertion that opposition to language on the back of defendant's jacket could incite viewers to violence); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (overturning breach of peace conviction although religious proselytizer's message "not unnaturally aroused animosity" in listeners).

Here, in contrast, no listeners can veto or silence any protestor from addressing them or anyone else. All unwilling targets can do is refuse to agree to have a message directed at them from closer than eight feet. Petitioners'

"listener's veto" argument fundamentally misunderstands both the operation of the Colorado statute, and this Court's prior decisions. No decision of this Court ever has held or even suggested that there is a right to persist in forcing speech on someone who does not want to be subjected to it at an invasively close physical distance.

Rather, prior decisions consistently have emphasized that there is no right to force speech on unwilling listeners. "Nothing in the Constitution compels us to listen to or view any unwanted communication," and there is no "right to press even a 'good' idea on an unwilling recipient." *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737-38 (1970). The right to distribute literature extends only to those "willing to receive it." *Schneider v. State*, 308 U.S. 147, 162 (1939). If there is no right to force one's message or literature on an unwilling recipient, then surely there is no right to force one's close physical presence on a person who wishes to preserve a couple of arms' length of personal space. As this Court emphasized in *Madsen*, face-to-face protest activity focused on vulnerable individuals who cannot easily avoid the close physical contact threatens patients' psychological and physical well-being and, thus, it appropriately may be regulated. 512 U.S. at 768. *See also Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (ban on residential picketing); *International Society of Krishna Consciousness v. Lee*, 505 U.S. at 684 (ban on airport solicitation).

II. THE COLORADO STATUTE IS NECESSARY TO PROTECT THE SIGNIFICANT GOVERNMENTAL INTEREST IN SAFE ACCESS TO HEALTH CARE

The principle that targeted "in-your-face" physically close demonstration directed at vulnerable individuals can be regulated applies with particular force in the health care context. People seeking or recovering from medical procedures often are at their most physically and psychologically vulnerable. As one witness, a disabled person who had undergone 35 surgeries, testified to the Colorado legislature, going in for medical care is a time of great stress and anxiety, and "[y]ou don't need additional stressors placed upon you when you are dealing with what for most people is the most stressful time in their entire lives." (JA at 157).

The tradition of quiet zones around hospitals is firmly entrenched, based on the recognition that noise, disruption, and confrontation are fundamentally incompatible with, and actually dangerous to, the normal and essential functions of health care. This Court reiterated in *Madsen* that because noisy, disruptive, invasive, threatening, and intimidating activities clearly are inappropriate in a health care setting, there is a strong governmental interest in protecting people from these dangers. 512 U.S. at 772-73.

An important component of the "time, place, and manner" inquiry is assessing whether certain kinds of protest activities are or incompatible with the purposes and needs of the places at which the activities are targeted. *See Grayned*, 408 U.S. at 116. Because the "cacophony of political protest" is so fundamentally incompatible with the needs of

health care facilities, staff, and patients, *Madsen*, 512 U.S. at 772-73, this Court has upheld restrictions on protest or solicitation activity at health care facilities that might not be justifiable in non-health care settings. *See, e.g., NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773 (1979) (ban on union solicitation in areas frequented by patients and their families is permissible); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) (same); *Madsen*, 512 U.S. at 769-71 (complete ban on all protest activity within 36 feet of entrance to health care facility is permissible).

The significance of the governmental interest underlying the Colorado statute – protecting safe and unfettered access to health care – is unassailable. Petitioners, however, understate the scope of this public interest when they argue that other provisions of the Colorado statute, such as the prohibition on physically obstructing access to health care, are fully sufficient to secure the governmental interest. (Petitioners' Brief at 21 n. 13). The governmental interest in securing safe access to health care is not sufficiently protected by simply prohibiting obstruction and blocking. Although physically preventing people from getting into or out of health care facilities undoubtedly is adverse to the compelling governmental interest in public health, forcing people to run a gauntlet of unobstructive but highly intimidating and stressful protest activity also seriously undermines the governmental interest in medical safety. It is this latter aspect of the governmental interest in safe access to health care – the need to reduce intimidation and physical and psychological stress – to which § 18-9-122(3) is directed.

A. Unwanted Invasions of Personal Space While Seeking Health Care Are Intimidating and Physically and Psychologically Dangerous

It is well-established in empirical medical and social science studies that maintaining an inviolate zone of personal space is indispensable to human functioning and physical and emotional security. (JA at 285-86, Affidavit of Expert Witness Dr. Marianne LaFrance). The risk to patients of unwelcome, threateningly close advances prior to undergoing a medical procedure was considered by the Colorado legislature, and formed an important basis for the enactment of the eight foot zone of separation in § 18-9-122(3). (JA at 108, 134, 136-37).

Maintaining a zone of personal space is essential to sustain privacy, and to provide a buffer against physical or psychological threat. (JA at 286). Research has established that in the United States, the necessary amount of personal space to maintain a sense of security and safety when encountering strangers in public is eight to twelve feet. (JA at 286). Edward T. Hall, *The Effects of Personal Space and Territory on Human Communication*, in NONVERBAL COMMUNICATION IN HUMAN INTERACTION 114-31 (Mark L. Knapp ed., 1978). Unwanted knowing invasions of personal space by strangers are perceived as aggressive and intimidating, and may trigger distinct physiological reactions: arousal, a "fight or flight" reaction, elevated blood pressure, palpitations, hyperventilation, and urinary retention. (JA at 273-74). *See* Irwin Altman, THE ENVIRONMENT AND SOCIAL BEHAVIOR: PRIVACY, PERSONAL SPACE, TERRITORY, CROWDING 93 (1975); Marianne

LaFrance et al., *Sex Differences in Reaction to Spatial Invasion*, 102 SOCIAL PSYCHOLOGY 59 (1977). *See also United States v. Scott*, 958 F. Supp. 761, 767 (D. Conn. 1997) (finding as fact that demonstrators' activity outside health care facility increases medical risk of surgical procedure).

These physiologic stress reactions can be exacerbated in the medical care context, when someone already is anxious, upset, or stressed by their illness or impending surgery. For most patients, even a minor surgical procedure can present "an important problem of emotional stress." Fritz-Ulrich Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 INT'L J. ORAL MAXILLOFACIAL SURGERY 688, 694 (1987). Patients subjected to exacerbated stress prior to surgical care have more complications, poorer surgical outcomes, experience greater pain and require greater use of painkillers or anaesthesia. *Id.*; Bernard S. Linn, M.D. et al., *Effects of Psychophysical Stress on Surgical Outcome*, 50 PSYCHOMATIC MEDICINE 230 (1988); Anne Mayande et al., *Anxiety and Endocrine Responses to Surgery*, 54 PSYCHOMATIC MEDICINE 275 (1992).

The Colorado law protects peoplewho are moments away from obtaining medical care from unwanted invasions of personal space and the attendant heightened medical risks. As such, it is both integrally related and narrowly tailored to the government's significant interest in ensuring safe conditions for health care.

In the context of reproductive health care facilities, many of which are besieged battlegrounds, as the legislative record in this case so starkly demonstrates, the governmental

interest in protecting people from intimidating, targeted, close physical encounters is particularly compelling. When a patient is coming in for the results of a pap smear, pregnancy test, rape counseling, or an abortion, she already may be experiencing a great amount of stress, and the unwanted close physical encounters with aggressive demonstrators significantly exacerbates it in physically dangerous ways. (JA at 66, 105 150). *See, e.g.*, Nancy E. Adler, et al., *Psychological Factors in Abortion*, AM. PSYCHOLOGIST 1194 (Oct. 1992); Catherine Cozzarelli & Brenda Major, *The Effects of Anti-Abortion Demonstrators and Pro-Choice Escorts on Women's Psychological Responses to Abortion*, 13 J. SOC. & CLINICAL PSYCHOL. 404 (1994) (stress from unwanted encounters with protestors leads to increased post-surgical depression).

The expert medical affidavit of Dr. Warren Hern demonstrates that, when patients seeking reproductive health care suffer the physiological harms emanating from unwanted invasions of personal space, it is more difficult to provide medical care safely. (JA at 273-74). Urinary retention may make it difficult to do an accurate pelvic exam; hyperventilation and agitation can lead to muscle spasms, which increase the risks of complications from surgery. (JA at 273-74).

The record in the *Schenck* trial court highlights other elevated medical risks from unwanted close physical encounters with demonstrators at reproductive health care facilities. Patients may be too stressed to absorb or follow important information about their surgery and follow-up care; they can be so fearful of encounters with demonstrators that they refuse to return for follow-up care, or delay medical

care so long that risks of complications are elevated; and they can suffer asthmatic attacks or dehydration. *See Pro-Choice Network of Western New York v. Project Rescue*, 799 F. Supp. 1417 (W.D.N.Y. 1992).

Other courts have found that similar adverse health effects result from unwelcome, "in-your-face" demonstrations outside of health care facilities. For example, in *United States v. Scott*, 958 F. Supp. at 767, the court found that:

> Shouting, pushing, blocking and otherwise interfering with a patient's access to [a health care facility] can increase the patient's stress level, and thereby increase the risks of a subsequent abortion procedure in the following ways. First, if the procedure is being done under local anesthesia, a stressed patient may experience significantly more pain than a patient who is not stressed. The stressed patient may also move around on the table during the procedure which creates a risk that the doctor could puncture the wall of the uterus. Second, if the procedure is being done under general anesthesia, a stressed patient requires significantly more anesthetic to keep her calm. This increases the risks of complications, such as aspiration of stomach contents. Finally, stressed patients may have increased post-operative risks. A stressed immune system has more difficulty fighting off infection.

(Internal citations omitted). These adverse medical effects resulted not from blockades, but from unwanted, aggressive "in-your-face" physical approaches to people on foot or in automobiles. *Id.* at 767-70. *See also Operation Rescue v.*

Planned Parenthood, 1998 WESTLAW 352942 (Tex. July 3, 1999) ("patients would enter clinics visibly shaken, crying, and nervous. Physicians reported increased respiration, heart rate, and blood pressure among such patients, which at times required sedatives to treat. These symptoms, some of which patients experienced even in the absence of protesters, became more acute when the demonstrations occurred.").

This sort of conduct, and its accompanying medical risks, goes well beyond the merely annoying, boisterous, robust debate on the public sidewalks that this Court has said we all must tolerate. *Boos v. Barry*, 485 U.S. 312, 318 (1988). This Court never has suggested that, in the name of "free speech," medical patients must unwillingly endure physically close invasions of their personal space that have well-documented adverse effects on their physical and psychological health, or that are sufficiently severe to deter them from obtaining timely medical care.

B. Zones of Separation Are an Essential Tool for Preserving Medical and Public Safety

The problems of aggressive physical confrontation and intimidation of people seeking health care services at facilities that offer abortions are not confined to Colorado and Western New York. They are enduring problems of national scope that led Congress to pass the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248 (1994).

While the passage of FACE in 1994 has had a positive effect on reducing physical blockades of reproductive health care facilities, targeted harassment of

staff and patients, and disruptive picketing continues unabated, against a backdrop of dramatic incidents of fatal violence. U.S. General Accounting Office (GAO), Report to the Ranking Member, Subcommittee on Crime, Committee on the Judiciary, House of Representatives, *Abortion Clinics: Information on the Effectiveness of the Freedom of Access to Clinic Entrances Act*, 2 (Nov. 1998). Disruptive picketing at reproductive health care facilities has escalated from a 1994 level of 1,407 instances, to a 1998 peak of 8,402 reports of picketing at clinics.[4] National Abortion Federation, *Incidents of Violence and Disruption Against Abortion Providers* (last modified Nov. 1999) <http://www.prochoice. org/ violence/ 99vd.htm> (hereinafter "NAF, *Incidents of Violence*"). An overwhelming majority – 78%, of abortion providers in the U.S. – experienced some form of disruptive picketing in 1997. Stanley Henshaw, et al., *Alan Guttmacher Institute Working Paper on Abortion Access* (1999).

The psychological toll of this protest activity on staff and patients is inalterably colored by the climate of increasing violence directed at reproductive health clinics. In 1998, there were two murders of abortion providers, and one attempted murder that left its victim permanently maimed. NAF, *Incidents of Violence*. During the period from January 1, 1997 to November 16, 1999, there were 8 clinic bombings, 20 arsons, 8 attempted bombings or arsons, and 41 death threats directed at clinic staff or patients. *Id.*

Each of these incidents inevitably heightens the

[4]"Disruptive picketing" generally is defined as protest activity that harasses, intimidates, and impedes staff or patients. *Id.*

perception of intimidation and fear from unwanted physical approaches by protestors. A telling example of this effect was revealed in testimony at the post-*Schenck* trial in *People of the State of New York et al. v. Operation Rescue National et al.*, CV. 99-209A (W.D.N.Y. 1999). Patients who had undesired close physical encounters with protestors while entering the clinic where one of the murdered doctors had worked remarked to clinic staff that they were terrified that the protestors were going to "get" them "like they got your doctor." (Testimony of Melinda DuBois). Others testified that when protestors closely approached pedestrians with their large, 3-foot square signs, people were so intimidated they walked into the busy street in an attempt to get away. One person walking her young child to elementary school could not get out of the way of the demonstrator, who aggressively moved close to her while brandishing his large sign, and the sign fell on her and bruised her eye. (Testimony of Gina DiChiara). If this protestor had been required to stay eight feet away, or to remain stationary as this pedestrian walked past, he could not have wounded this woman.

Although the buffer zone upheld by this Court in *Schenck* was in full force and effect at these Western New York clinics, the intimidating, physically close encounters described above took place outside the fixed buffer zone. Thus, zones of separation between protestors and their targets, such as the one in the Colorado statute, are essential tools for maintaining public safety and reducing intimidation of medical patients. In fact, testimony before the Colorado legislature demonstrated the beneficial effects of "de-escalation" after the nearly identical Boulder and Denver,

Colorado ordinances were enacted. (JA at 106-7, 147, 210).

A zone of separation provision in an injunction or statute may be the only practicable way to protect public safety and access to medical care. It is not geographically or constitutionally feasible to craft a fixed buffer zone at every reproductive health facility that will protect everyone seeking access from unwanted aggressively close physical encounters. Some urban clinics open directly onto a public sidewalk, and are served by parking lots or bus or train stops blocks away; staff and patients must then traverse a lengthy gauntlet of protestors attempting to impede and intimidate them, and get in their face before they reach the safety of the buffer zone. *See, e.g., Scott*, 958 F. Supp. at 765, 783 (describing physical location of clinic and proximity to parking and bus stops). In such a case, a sufficiently large fixed buffer zone extending more than a full city block would be a significantly more restrictive means of protecting the governmental interests than a narrow zone of separation. Legislatures and courts must preserve every option, including a modest zone of separation between protestors and their targets, to resolve the particular harms they seek to address.

III. THE COLORADO STATUTE IS NARROWLY TAILORED AND BURDENS NO MORE SPEECH THAN NECESSARY TO PROTECT THE GOVERNMENTAL INTEREST IN SAFE ACCESS TO HEALTH CARE

Amici agree with Respondents that the *Ward* time, place, and manner test for assessing statutes that affect speech rights is the appropriate standard to be applied to the

Colorado statute, and that this case does not present an occasion for revisiting the issue of the slightly different standards used to evaluate injunctions and generally applicable statutes. However, the Colorado statute is constitutional even under the *Madsen - Schenck* test used for injunctions: it burdens no more speech than necessary to protect the significant governmental interest in safe access to health care. *Madsen*, 512 U.S. at 765; *Schenck*, 519 U.S. at 371.

By regulating only unwanted targeted physical proximity while curtailing not even unwelcome speech, § 18-9-122(3) is precisely tailored to the problem the legislature sought to address: close invasions of personal space that impede and crowd patients and are inherently intimidating because of their physical closeness and unwelcomeness.

Unlike the fifteen-foot zone of separation struck down in *Schenck*, the eight-foot zone in the Colorado statute does not burden any more speech than necessary because eight feet is a "normal conversational distance" for public communication between strangers. *United States v. Scott*, 187 F.3d 282, 288 (2d Cir. 1999) (upholding eight-foot injunctive zone of separation). One does not have to raise one's voice to be heard from a distance of eight feet, and even small signs will be visible from a distance of two arms' length.

Moreover, by prohibiting only "knowingly approaching without consent," the Colorado statute eliminates the risk of inadvertent violations that troubled this Court in *Schenck*, 519 U.S. at 378-79, and permits a demonstrator to stand still anywhere outside a health care facility, even when a patient passes them at a distance of less

than eight feet.[5] This is a crucial distinction from the *Schenck* fifteen-foot zone, because that provision, lacking any scienter element, required demonstrators at all times to stay fifteen feet away from everyone seeking access to the clinic. Under the Colorado statute, no demonstrator has to back away from anyone; a demonstrator must refrain only from "knowingly approaching" a specific individual within eight feet. Any demonstrator can offer a leaflet to anyone who passes, and if stationary demonstrators position themselves close to a health care facility's entrance they will have highly effective leafletting access to everyone going in or coming out.[6] If any passerby reaches out his or her hand to take a leaflet, the protestor is free to step right up to that passerby because the passerby has signaled his or her willingness to permit closer proximity.

The Colorado statute also is significantly different from, and much narrower, than the "no approach" provision

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[5]Because the Colorado law prohibits only "approaches," Petitioners and their *amici* err when they argue that the statute prohibits all leafletting. (Brief of the American Federation of Labor and Congress of Industrial Organizations, at 7). Demonstrators who wish to leaflet either may stand still anywhere outside a health care facility, or they may approach up to eight feet away from their target with an outstretched arm, in which case, if the target wants to accept the leaflet, all he or she has to do is take one or two steps closer.

[6]Permitting demonstrators to stand still near the entrance of a health care facility does not defeat the purpose of the statute. It is the movement of the approach, when combined with proximity, that is intimidating, especially in the context of reproductive health care facilities, outside of which so much violence has occurred. *See* NAF, *Instances of Violence*.

invalidated in *Madsen*. The injunctive provision this Court struck down in *Madsen* prohibited all approaches within 300 feet of the clinic. 512 U.S. at 773-74. There was no provision in the *Madsen* injunction indicating that a demonstrator could approach up to any specific distance within the 300-foot zone, permitting the construction that the injunction prohibited any and all demonstration within 300 feet of the facility. This swept up far more speech than necessary, because it would have barred simply starting to cross the street or walk down the sidewalk to move towards a person 300 feet away. Thus, the *Madsen* "no approach" provision allowed no opportunity even to come within shouting distance, much less normal conversational distance. *Id.* at 774.

In contrast, the Colorado statute permits all approaches, whether welcome or not, within 100 feet of the clinic. The only prohibition is against approaching a specific targeted person at a distance closer than the normal conversational and personal-space distance of eight feet. Unlike the *Madsen* provision, pursuant to the Colorado law, all forms of constitutionally protected activity are allowed and remain fully meaningful because they can be seen and heard without shouting or straining. Unlike the broader prohibition in *Madsen*, the Colorado statute confers permission to approach someone even without his or her consent right up to eight feet away. This ensures that all speech can be received, regardless of whether it is welcome. No passerby or patient can escape any protestor's message; they are afforded a mere two arms' length zone of personal space in which to proceed on their way, insulating them from physical and psychological intimidation without silencing

any speech whatsoever.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

STATEMENTS OF AMICI

Abortion Access Project

The Abortion Access Project (AAP) is a group of activists and health care providers that seeks to increase awareness of abortion as a critical part of comprehensive reproductive health services, address the shortage of abortion providers, and ensure access to abortion for all women. Around the country and including Colorado, health care professionals and patients have been subjected to physical and verbal assaults, intimidation, and harassment, all aimed at interfering with the exercise of the right to abortion. The presence of anti-abortion protesters at the doors of clinics is also intended to intimidate health care professionals who include abortion in their medical practice. In this context, the limited restriction on protesters near clinic entrances is necessary to protect women's right to abortion.

The American Jewish Committee

The American Jewish Committee (AJC), a national organization of approximately 100,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. AJC believes that this goal can best be achieved by preserving the constitutional rights, including the fundamental right of access to abortion, of all Americans. While firmly committed to defending the First Amendment's freedom of expression guarantees, AJC believes that

harassment designed to impede others in the exercise of their constitutional rights has no place in this or any other public policy debate.

The American Jewish Congress

The American Jewish Congress (AJCongress) is an organization of American Jews founded in 1918 to protect the civil, political, religious and economic rights of American Jews. AJCongress is a supporter of both a woman's right to choose and the right of citizens to peacefully express themselves on matters of political and social importance. Because this case requires this Court to strike a balance between those rights, AJCongress is seeking to file this brief.

The Center for Constitutional Rights

The Center for Constitutional Rights is a national, non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights.

Founded in 1966, the Center undertakes litigation on behalf of women seeking to vindicate their civil rights, engages in advocacy on behalf of women and women's rights organizations on a wide range of issues, and assists in the development of legislative policy at the municipal, state and federal levels of government. The Center's current women's' rights and education docket focuses primarily on

issues surrounding the severe repression of women's choices regarding sexuality, reproduction, and childrearing, discrimination and unfair treatment in employment, and violence against women in the home and in the workplace.

The Center for Reproductive Law and Policy

The Center for Reproductive Law and Policy (CRLP) is a non-profit legal and policy advocacy organization dedicated to protecting women's reproductive rights. CRLP's domestic and international programs engage in litigation, policy analysis, legal research and public education, and seek to ensure that all women have access to appropriate and freely chosen health services.

Colorado NARAL

Colorado NARAL is a pro-choice political organization representing 5,000 members statewide that works to protect and promote reproductive choices for all of Colorado. Colorado NARAL and its volunteers worked hard to pass this statute, having witnessed the harassment of women, physicians, and other clinic workers at reproductive health care facilities.

The Colorado Women's Bar Association

The Colorado Women's Bar Association (CWBA) is a professional association of attorneys, comprised primarily of female attorneys who live and practice in Colorado. The CWBA strives to promote, advance and protect the interests

and welfare of women. Through participation in this case, the CWBA seeks to protect the privacy and safety of women who seek medical care. Physical intimidation tactics and outright violence by abortion protesters impede women's access to necessary medical care and discourage medical professionals from providing medical services. The CWBA believes the Colorado restriction on extremely close contact between protestors and women seeking medical care is a constitutionally permissible restriction.

The Connecticut Women's Education and Legal Fund

The Connecticut Women's Education and Legal Fund (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF was founded in 1973 and has a membership of over 1,400 individuals and organizations. CWEALF seeks to join this brief as amicus curiae because we are committed to protecting women's reproductive rights. CWEALF initiated and wrote an amicus brief in a similar case, *U.S. and Connecticut v. Scott*, in 1998.

The Feminist Majority Foundation

The Feminist Majority Foundation (the Foundation) is a non-profit organization with offices in Arlington, Virginia and Los Angeles, California. The Foundation is dedicated to eliminating sex discrimination and to the promotion of equality, women's rights and safe access to abortion and birth control. The Foundation actively pursues legal

protection for reproductive health services, and provided legal counsel for Respondents in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), which upheld the use of clinic safety buffer zones. The Foundation also submitted amicus curiae briefs in support of the Solicitor General in *Reno v. Condon*, No. 98-1464, and of the Respondents in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). The Foundation runs the largest clinic access program in the nation, working with physicians and clinic staff, as well as law enforcement, to protect reproductive health care providers from threats of violence and from violence. Since 1989, the Foundation's National Clinic Access Project has mobilized and trained more than 45,000 volunteers in 47 cities in 27 states, including Colorado, to assist clinics targeted by anti-abortion groups.

National Abortion Federation

The National Abortion Federation (NAF) is the professional association of abortion providers in the United States and Canada. NAF members include over 350 nonprofit and private clinics, women's health centers, Planned Parenthood facilities, and private physicians in 49 states, including nine clinics in Colorado. NAF's programs include accredited continuing medical education and training, clinic security, public and consumer education, and advocacy in furtherance of its mission to keep abortion safe, legal, and accessible.

As an organization representing abortion providers, NAF is very familiar with the effects of anti-abortion disruption on patients and facilities. The fear that patients experience as a

result of anti-abortion protests and harassment can increase the risk of complications during the abortion procedure, posing a threat to women's health. NAF strongly believes that Colorado's buffer zone legislation is crucial in protecting the public and ensuring the safety of patients.

National Abortion and Reproductive Rights Action League; National Abortion and Reproductive Rights Action League Foundation

The National Abortion and Reproductive Rights Action League (NARAL) and the NARAL Foundation (hereinafter "NARAL"), with 29 state affiliates and hundreds of thousands of members and supporters nationwide, are dedicated to keeping abortion safe, legal, and accessible for all women. NARAL's mission is to work through the political process to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices, including preventing unintended pregnancy, bearing healthy children, and choosing legal abortion. NARAL supports and protects as a fundamental freedom a woman's right to make reproductive choices through education, training programs, and public policy initiatives. NARAL recognizes that the nationwide campaign of anti-choice violence threatens women's right to choose abortion by exacting a physical and emotional price from patients who seek access to abortion, and by exacerbating the shortage of doctors willing to provide abortion services.

The National Center for the Pro Choice Majority

The National Center for the Pro Choice Majority is a non-profit organization that provides a research and information service to the pro-choice movement. It publishes a national newsletter, *The Pro Choice Report*, which informs its readers about the many varied occurrences that impact on the right to legal abortion. The organization has specialized in monitoring the hundreds of clinic/medical office blockades and protests that have been conducted by anti-abortion militants, and the resulting trials and convictions.

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to combat gender-based discrimination and secure equal rights. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF's work is to secure reproductive rights for all women. To this end, NOW LDEF has litigated numerous cases involving clinic violence and efforts to protect safe access to reproductive health services, including *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), *New York State Nat'l Org. for Women v. Terry*, 952 F. Supp. 1033 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 86 (1998), *cert. denied, Pearson v. Planned Parenthood Margaret Sanger Clinic*, 119 S. Ct. 2336 (1999) and *Nat'l Org. for Women v. Operation Rescue*, 929 F. Supp. 461 (D.D.C. 1996). NOW LDEF has also intervened on behalf of doctors, women and

clinics to defend the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, against constitutional challenges in several cases, including *Terry v. Reno*, 101 F.3d 1412 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997). NOW LDEF consults with local advocates across the country on the legal issues surrounding local residential picketing and buffer zone ordinances, and has published *Drawing the Line*, a handbook for community advocates seeking to enact, enforce and defend ordinances that preserve women's access to reproductive health care facilities and protect health care providers' safety and privacy.

National Women's Health Network

The National Women's Health Network is an independent, member-supported organization dedicated to safeguarding women's health rights and interests. The Network advocates for better policies on women's health and provides women with information and resources to assist them in making better health care decisions. Nationwide, the Network has more than 12,000 individual members and 300 organizational members. Since it was founded in 1975, the Network has advocated for policies that preserve and protect a woman's right to determine her own reproductive future. The Network's support for the statute in question in *Hill v. Colorado* stems from the organization's commitment to protecting women's access to high quality health care without unnecessary medical risks and to ensuring that women are able to exercise reproductive rights without fear of harassment or violence.

The Northwest Women's Law Center

The Northwest Women's Law Center (NWLC) is a non-profit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Since its founding in 1978, the NWLC has been dedicated to protecting and expanding women's reproductive rights, and has long focused on the threats to women's access to abortion providers. Toward that end, the NWLC has participated as counsel and as *amicus curiae* in cases throughout the Northwest, and the country, to ensure that women have the ability to make their own reproductive choices. For example, in *Aradia Women's Health Center, et al. v. Operation Rescue, et al.*, the NWLC represented abortion clinics, women's groups, physicians and patients in a case against Operation Rescue. The Law Center obtained the first injunction in the country that applied to all clinics in the state, and effectively stopped the blockades by bringing contempt actions against blockaders who refused to obey the court's injunction. The NWLC has also, *inter alia*, challenged efforts by prosecutors to bring criminal charges of child abuse against women who use controlled substances while pregnant; successfully fought anti-choice initiatives, and challenged efforts to force sterilizations on developmentally disabled women. The NWLC is currently involved in legislative and litigation efforts that seek to limit women's reproductive freedom. The NWLC continues to serve as a regional expert and leading advocate on reproductive freedom.

Planned Parenthood Federation of America

Planned Parenthood Federation of America (PPFA), a not-for-profit corporation organized in 1922, is the leading national voluntary health organization in the field of family planning. Currently, PPFA has 132 affiliates in 47 states and the District of Columbia operating approximately 875 health centers. PPFA affiliates offer a wide range of services relating to reproductive health, including abortion.

PPFA, whose members and affiliates provide abortions and other medical treatment, have a strong and abiding interest that this Court be fully aware of the profoundly harmful consequences for medical patients and the provision of medical care that result from anti-abortion harassment and intimidation outside of abortion clinics and other medical facilities. PPFA, its members and affiliates, have obtained and will continue in the future to seek, injunctive relief similar to that at issue in this case in an effort to lessen the often devastating impact of the protesters' conduct upon abortion and non-abortion patients alike, and upon the providers' ability to render care.

Planned Parenthood of the Rocky Mountains, Inc.; Planned Parenthood of the Rocky Mountains Services Corporation

Amici curiae Planned Parenthood of the Rocky Mountains, Inc., and Planned Parenthood of the Rocky Mountains Services Corporation (PPRM and PPRMSC) are providers of reproductive health care to women and men in Colorado.

PPRM is the oldest and largest provider of reproductive health care services in Colorado and presently operates a network of 30 health facilities located throughout the state. Although PPRM does not provide abortion services, several of its health facilities have been the target of organized protest. PPRM offered testimony before the General Assembly in favor of Colo. Rev. Stat. § 18-9-122, and was granted leave to participate as *amicus curiae* in this matter by the Colorado Court of Appeals and the Colorado Supreme Court.

PPRMSC was organized in 1999 to provide comprehensive reproductive health services, including medical and surgical abortion, in Colorado. PPRMSC presently operates four health facilities located in the cities of Colorado Springs, Denver, Durango, and Fort Collins. Its Denver health facility is the target of organized protests and demonstrations five days a week. In Colorado Springs, protesters appear at the health facility every Saturday, while in Fort Collins and Durango, demonstrations are unannounced and unpredictable.

Both PPRM and PPRMSC's interests will be substantially affected by the Court's decision in this matter, as the statute serves to protect their patients throughout Colorado.

Republicans For Choice

Republicans For Choice (RFC), with over one hundred thousand members nationwide, is dedicated to keeping family planning and reproductive health care accessible for

all women.

RFC's mission is to work through the political process to ensure every woman the right to make personal decisions regarding the full range of reproductive health care. RFC supports and protects as a fundamental freedom a woman's right to make reproductive choices through education, training programs and public policy initiatives.

RFC recognizes that the nationwide campaign of anti-choice violence, harassment and intimidation has created a climate of fear. This threatens women seeking care at reproductive health care facilities by exacerbating the health effects of their fear.

The Women's Law Project

The Women's Law Project (the Law Project) is a Philadelphia-based, non-profit women's legal advocacy organization founded in 1974 for the purpose of advancing women's legal, social, and economic status. The Law Project provides free telephone counseling to 8,000 callers a year on problems including domestic violence, child support and custody, divorce, employment discrimination, and welfare.

The Law Project has litigated extensively on behalf of women's medical providers and patients. Its litigation docket has included such landmark reproductive rights cases as *Planned Parenthood v. Casey, Elizabeth Blackwell Health Center for Women v. Knoll. Roe v. Operation Rescue,* and *Thorn burgh v. American College of Obstetricians and*

Gynecologists. A number of its clients have experienced illegal, violence clinic blockades, arson fires, bomb threats, assaults, chemical attacks, and death threats by anti-abortion extremists. The Law Project has advocated for vigorous enforcement of the Freedom of Access to Clinic Entrances Act and has worked extensively with local and state law enforcement authorities in Pennsylvania to assure the safety of abortion providers and their patients.